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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-112

UNITED STATES OF AMERICA,

Respondent,

v.

WEYERHAEUSER COMPANY, a Washington
corporation, CROWN ZELLERBACH
CORPORATION, a Nevada corporation,

Petitioners.

**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MANLEY B. STRAYER
JAMES P. ROGERS
CLEVELAND C. CORY

2300 Georgia-Pacific Building
Portland, Oregon 97204

Counsel for Petitioners

*Weyerhaeuser Company and
Crown Zellerbach Corporation*

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The brief for the United States demonstrates the urgency of review by the Court of the important federal condemnation law questions presented by the Petition for Writ of Certiorari. Counsel for the United States argue that the enactment by the Congress in 1937 of legislation for the management of O&C timberlands (Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. 1181a and 1181b) created a special and extraordinary need for use by the United States of privately owned roads to remove government owned tim-

ber; and therefore that the right to such use may be taken under the doctrine of *United States v. Cors*, 337 U.S. 325, without compensating the owners for any portion of the investment in such roads.

The effects of such distortion of the rule in *Cors* extend far beyond the facts of this case — obviously, to every privately owned road throughout the O&C region, and, by the same reasoning, to every privately owned road capable of providing service to any portion of the millions of acres of public lands throughout the country which are required by statute to be administered for multiple use and sustained yield.

Contemplation of the consequences of the government's construction of *Cors* indicates the fallacious nature of the argument. It simply proves too much. If the government's position were valid, it ought not to have entered into the 20-year agreements in this case, for it could have condemned the right to use the road free of charge immediately upon its completion. And it should not have adopted cost-sharing regulations authorizing the expenditure of federal funds for the use of private roads which it was entitled to use free of charge. Such a strained construction of *Cors* leads to an impermissible result — the confiscation of private property without just compensation.

In the interest of accuracy, we wish to correct misstatements of the record in this case contained in the brief for the United States. Contrary to the statement on page 6 of its brief, petitioners have never contended either that under the previous 20-year agreements

or under "the renewal agreements which inevitably would have been entered into, the United States obligated itself to pay a portion of the capital costs of the Molalla Road, based on its percentage of the timber in the watershed logically tributary to the road." As stated on page 5 of the Petition for a Writ of Certiorari, the 20-year contracts "did not expressly incorporate the cost-sharing formula authorized by the regulations, possibly because, as noted by the District Court, the parties believed most of the federal timber would be removed by 1973, when the contracts would have expired." Nevertheless the contracts did provide a method of cost-sharing by requiring payments from nonowners proportionate to their use of segments of the Molalla Road.

Although petitioners have never contended that absent condemnation the United States would have been obligated to enter into *any* type of renewal agreement, we agree with the statement of the Court of Appeals, and the District Court's finding, that "there is little doubt, that absent condemnation a new road use agreement would have been signed." After all, each party had need to use segments of the road owned by each of the other two parties and the government's regulations were designed for precisely such a situation.

While, as stated on page 7 of the Petition for Writ of Certiorari, we cannot say with certainty what form the agreement would have taken, obviously it would have complied with the current regulations by

providing in some manner for payment by the United States of "just compensation, including a fair share of the maintenance and amortization charges attributed to such road . . ." (43 C.F.R. 2812.0-6(e); Ex. D, R. 79.) In determining that share, the formula provided in the regulations would have taken into account and credited the government with all federal timber removed in the past under the 20-year agreements, even though they were not expressly phrased as cost-sharing agreements.

Had there been no condemnation, a potential buyer of petitioners' properties would have considered the probability of such renewal agreements being entered into and would have given this weight in arriving at a conclusion as to fair value of the property taken.

The Petition for Writ of Certiorari should be granted and the erroneous rulings of the District Court and Court of Appeals reversed so that the jury may consider those factors in assessing just compensation.

Respectfully submitted,

MANLEY B. STRAYER
JAMES P. ROGERS
CLEVELAND C. CORY
Counsel for Petitioners